

ESTTA Tracking number: **ESTTA611254**

Filing date: **06/20/2014**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92059276
Party	Plaintiff The Candy Company, Inc.
Correspondence Address	MICHAEL A PENN BRISKIN CROSS & SANFORD LLC 1001 CAMBRIDGE SQUARE SUITE D ALPHARETTA, GA 30009 UNITED STATES mpenn@briskinlaw.com
Submission	Other Motions/Papers
Filer's Name	Michael A. Penn
Filer's e-mail	mpenn@briskinlaw.com
Signature	/Michael A. Penn/
Date	06/20/2014
Attachments	Hinkle Affidavit in Support of Cancellation.pdf(4056897 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re:

Registration No. 4273018

Mark: ÜSERVE

The Candy Company, Inc.,

Petitioner,

v.

Yogen Früz, U.S.A., Inc.,

Registrant.

AFFIDAVIT OF TROY L. HINKLE

STATE OF GEORGIA

COUNTY OF FULTON

PERSONALLY APPEARED before me, an officer duly authorized by law to administer oaths, Troy L. Hinkle, who, after first being duly sworn, states:

1. My name is Troy L. Hinkle and I am competent in all respects to testify regarding the matters set forth herein. I have personal knowledge of the facts stated in this Affidavit and give this Affidavit voluntarily in support of the Petition for Cancellation of Registered Mark filed by THE CANDY COMPANY, INC. ("The Candy Co.") on May 25, 2014.

2. I am the President of THE CANDY CO., which is the owner of the mark "U-SERV MARKET" (the "TCC Mark").

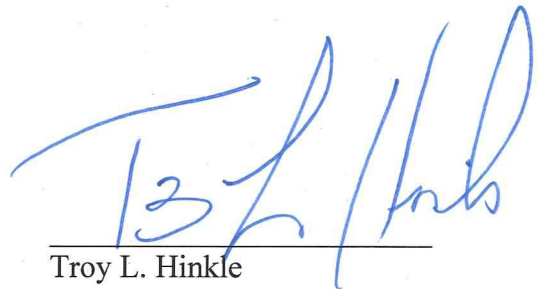
3. THE CANDY CO. has used the TCC Mark in commerce since at least as early as March 18, 2010. Attached hereto as **Exhibit A** is a true and accurate copy of the Service

Agreement between THE CANDY CO. and its client, LXE, INC. ("LXE"), dated March 18, 2010, in which THE CANDY CO. contracted to provide LXE with a "U-SERV MARKET" store area.

4. Attached hereto as **Exhibit B** is a true and accurate depiction of the TCC Mark in use in the LXE "U-SERV MARKET".

5. Attached hereto as **Exhibit C** is a true and accurate copy of the Credit and Market Sales Report for the "U-SERV MARKET" services provided to LXE, which reflects sales within the U-SERV MARKET during the week of July 1, 2010.

AFFIANT FURTHER SAYETH NOT.


Troy L. Hinkle

Sworn to and subscribed before me
this 19 day of June, 2014


Notary Public

My Commission Expires:

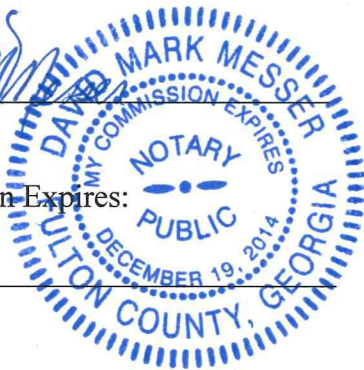


Exhibit A

**REFRESHMENT WORKS
BREAKROOM SERVICE
AGREEMENT**

Date: MARCH 18, 2010

Client: LXE Inc.

Address: 125 Technology Parkway

City: Norcross State: Georgia Zip: 30092

Service Authorization: Client hereby grants to The Candy Co. Inc. (doing business as, and hereinafter referred to as "Refreshment Works") the exclusive right during the term of this Agreement to provide food and beverage services at the Client's location at 125 Technology Parkway, Norcross, Georgia 30092 ("Client's Premises"); provided, however, that the provision of food and beverages at meetings, training and fund-raising events held at Client's Premises shall not be included in the exclusive rights of Refreshment Works granted under this Agreement. Refreshment Works will install and maintain in good working order the "FAST TRACK" technology equipment and software provided by Freedom Shopping, Inc. and/or its business channel partners (such as FastTrack), at Client's Premises and shall maintain such equipment and software at all times in the most current version of such technology as is generally available to business partners of Freedom Shopping, Inc.

Service Conditions:

A. Equipment: Refreshment Works will provide all "FAST TRACK" equipment and related equipment and software, as well as inventory of food and beverage items necessary to provide services on Client's premises as mutually agreed, but in all events at least in reasonably satisfactory service in terms of ease of use, payment systems accessibility, selection and freshness of inventory, prices and customer satisfaction generally, and shall have such services operational and ready for Client's personnel's use on or before June 13, 2010. Refreshment Works shall remain the owner of, and shall at all times bear the risk of loss of and damage to, all store fixtures and technology, and related equipment and food and beverage inventory, and shall make all necessary repairs to such equipment and shall provide all necessary maintenance and sanitation for such equipment. Refreshment Works will do its best to maintain up time not less than 99% of the time, 24 hours per day and 7 days per week, during every period of 30 consecutive days.

B. Client's Premises, Utilities: Client agrees to provide Refreshment Works with access to Client's Premises during normal business hours (and after normal business hours pursuant to access process to be mutually agreed in good faith), subject to Client's operating and security procedures, for purposes of providing the services hereunder, and to provide all utilities required for Refreshment Works to provide the services hereunder; specifically, electricity, internet access (subject to limitations and conditions of access and use specified by Client and in accordance with Client's policies and procedures), local phone line, and connections to such communications media. Client will maintain Client's Premises, including the cleaning of the floors in the U-SERV store area.

C. Personnel: Refreshment Works shall provide trained personnel to properly service the U-SERV and related equipment. Employees of Refreshment Works will be subject to the rules and regulations of Client, including Client's operating and security procedures, while on Client's Premises.

D. Additional Provisions:

1. Financial Terms: Client shall have no obligations of payment of any kind to Refreshment Works with respect to the services, of U-SERV equipment for food and beverage inventory provided by Refreshment Works at Client's Premises U-SERV location. Selling prices of food and beverage items offered through the services will be at all times consistent with those charged for the same or similar items at locations with similar sales volumes in the Atlanta metropolitan statistical area, and shall include applicable state and local sales taxes.
2. Indemnification and Insurance. Refreshment Works shall defend, indemnify and hold Client and its affiliates harmless from and against any and all claims, damages, judgments and liabilities Client and its affiliates may suffer arising out of injuries to persons or loss of, or damage to, personal property caused by the negligence, unlawful act or willful misconduct of Refreshment Works or of its personnel, subcontractors or agents.

Refreshment Works shall, at its own cost and expense, obtain and maintain in full force and effect, with financially sound and reputable insurers, during the term of this Agreement, the following insurance coverages: Worker's Compensation as required by Georgia law; employer's liability insurance with a minimum limit of \$500,000 of liability; Comprehensive General Liability insurance against all hazards with a minimum limit of liability for personal injury, including death resulting therefrom, on an occurrence basis of \$1,000,000 in the aggregate, and with a minimum limit of liability for property damage on an occurrence basis of \$1,000,000 in the aggregate; and Automobile Liability insurance against liability arising from the maintenance or use of all owned, non-owned and hired automobiles and trucks with a minimum limit of liability for bodily injury of \$1,000,000 in the aggregate, and with a minimum limit of liability for property damage of \$500,000 per accident. Refreshment Works' insurance shall be deemed primary. Refreshment Works shall provide Client with certificates of insurance evidencing the coverages required hereunder within 15 days after execution of this Agreement. Each policy required hereunder shall name Client as an additional insured and shall provide that Client shall receive 30 days' advance written notice in the event of a cancellation or material change in such policy.

3. Licenses, Permits, and Taxes, Refreshment Works will secure and pay for all federal, state, and local licenses and permits required for the "U-SERV" service operation, as well as collect and pay all federal, state, and local sales, use and excise taxes attributable to the refreshment services provided.
4. The initial term of this agreement is for 5 years commencing on the date set forth above and will be renewed on a year to year basis thereafter upon written agreement of both parties, 90 days before end of term.
5. Termination for cause: In the event either party fails to perform as set forth in this agreement, the non-breaching party shall provide the breaching party with written notice, specifying the nature and extent of the deficiencies and demanding a cure. If such deficiency is not cured within 30 days following the date of such notice, then the non-breaching party may terminate this agreement upon written notice. In the event of any such termination, Refreshment Works shall promptly remove from Client's Premises all of its equipment and inventory without damage to Client's Premises.
6. Other Termination: Refreshment Works will have the option to terminate this Agreement and remove "FAST TRACK" equipment due to Client's location's inability to support profitable operation of the services upon 60 days' prior written notice to Client. In the event Client notifies Refreshment Works in writing of its intent to quit Client's Premises or cease operation of the business at Client's Premises, or is the subject of voluntary or involuntary bankruptcy or similar proceedings, Refreshment Works at its option, may remove its equipment without further obligation of Refreshment Works to Client with respect to performance of the services and this Agreement shall terminate immediately upon such removal. Notwithstanding any such termination or termination for cause otherwise permitted under this Agreement, the provisions of

sections C.2 (Indemnification and Insurance) and C.8 (Confidentiality) shall survive such termination or expiration of this Agreement for a period of 3 years.

7. Notice: Notices required in this agreement shall be in writing and must be mailed first class to the contracts Dept. at Refreshment Works 450 S. Cemetery St, Suite 201., Norcross, Ga. 30071.
8. Confidentiality: Refreshment Works shall keep non-public information it receives from Client or to which it has access based on its presence at Client's Premises in strict confidence exercising the same standard of care used by Refreshment Works to protect its own confidential and proprietary information, but in any event not less than reasonable care, to prevent the disclosure of such information to any third party. Refreshment Works will not use such information for any purpose other than for the benefit of Client in furtherance of the purposes of this Agreement. In the event of a breach or threatened breach of the provisions of this section C.8, Client will be entitled to an injunction restraining such breach or threatened breach without having to prove actual damages.
9. Force Majeure: If the performance of this Agreement, or of any of the obligations specified herein, is prevented, delayed, restricted or interfered with by reason of any act of God, including (without limitation) fire, flood, hurricane, tornado, earthquake act of war or terrorism, labor strike or other cause or causes beyond the reasonable control of the affected party, the party so affected, upon giving prompt notice to the other, will be excused from performance to the extent of the prevention, delay, restriction, or interference, provided that the party so affected shall use its best efforts to avoid or remove the causes of non-performance hereunder and will resume performance with the utmost dispatch whenever such causes are removed.
10. Merger: This Agreement is the entire agreement with respect to the subject matter hereof and supersedes all previous and contemporaneous agreements and understandings, whether oral or written, between Client and Refreshment Works with respect to its subject matter, which are hereby made null and void.
11. No Assignments: Neither party may assign this Agreement in whole or in part, or delegate any duties hereunder, without the prior written consent of the other party, and any attempted assignment or delegation without such consent shall be void and of no effect.

Client and Refreshment Works accept and agree to the terms and conditions of this Agreement.

LXE Inc. ("Client")

The Candy Co. Inc. ("Refreshment Works")

By 

By _____

Title VP & GM, LXE

Title _____

Date MARCH 18, 2010

Date _____

Exhibit B

Exhibit C

Logged in as: troy@refreshmentworks.com | Organization: RefreshmentWorks | Logout

[Dashboard](#) [Location](#) [Product](#) [Inventory](#) [Reports](#) [Market Users](#) [Coupons](#) [Commercial](#) [Admin](#)

Cashflow Credit and Market Card Sales for LXE

From 07/01/2010 to 07/08/2010

Location	Credit Card Sales	Market Card Sales	Coupon Sales	Sales Total	Recharge Credit	Recharge Credit Bonus	Recharge Cash	Recharge Cash Bonus	Recharge Coupon	Recharge Added Money	Recharge Total
LXE	\$15.93	\$227.02		\$242.95	\$225.00		\$187.00			\$242.00	\$654.00
Grand Total	\$15.93	\$227.02	\$0.00	\$242.95	\$225.00	\$0.00	\$187.00	\$0.00	\$0.00	\$242.00	\$654.00